DOCUMENT RESUME

01653 - [A1051921]

[Alleged Breach of Logging Sale Contract]. B-185199. April 1, 1977. 17 pp.

Decision re: Gene Peters; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Forest Service.
Authority: B-156271 (1965). B-162922 (1972). B-168584 (1974). B-175895 (1974). B-179243 (1975). B-184647 (1977). Forest Service Manual 2451.83 (Amend. 93). 36 C.F.R. 221.16(a). 36 C.F.R. 221.7(e). 43 Comp. Gen. 217. 43 Comp. Gen. 221. 49 Comp. Gen. 530, 531. 49 Comp. Gen. 761. 54 Comp. Gen. 527, 528. 55 Comp. Gen. 60. 55 Comp. Gen. 68. 16 U.S.C. 476.

Contractor contended that modification of timber sale contract to change logging method and raise stumpage rates was unauthorized, improper, and constituted a breach of contract and that he should be refunded increased price paid under the modification. The claim was unsupported by the evidence, and, consequently, was denied. (Author/DJM)

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Proc I

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-185199 DATE: April 1, 1977

MATTER OF: Gene Peters

DIGEST:

1. Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging.

2. Forest Service action of modifying contract to change logging methods and raise stumpage rates is not inconsistent with Forest Service Manual. In any case, manual is merely expression of Forest Service policy, of which failure to adhere does not render action invalid.

3. Contractor's allegation that modification of Forest Service timber sale contract allowing use of contractor's requested alternate logging methods instead of helicopter logging and increasing stumpage rates was signed by contractor because of coercion and duress is not supported, where first indication of protest in record was almost month after modification's execution, contractor could have continued helicopter logging instead of signing agreement, and there is no indication that Forest Service wrongfully threatened contractor with action it had no legal right to take.

4. Contractor has alleged that modification agreement to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates lacked consideration since Forest Service could have allowed change without increasing rates. However, contractor received consideration of being relieved of more risky and costly logging method and being allowed to use equipment he apparently was more familiar with and had more control over.

5. Contract modification to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates is not unconscionable under Uniform Commercial Code Section 2-302, as contended by contractor, where contractor is experienced logger, record indicates that Forest Service apprised contractor of scope and nature of modification over month prior to its execution and modification was lawful and not one-sided.

6. Modification of Forest Service timber sale contract was permitted under terms of contract. In any case, in absence of coercion, duress or unconscionability, contractor's signing of modification agreement and continuing contract performance in accordance with modification, without indication of protest and with apparent knowledge of modification's scope, constituted "election" or waiver of contractor's "right" to now assert that modification was beyond scope of contracting officer's authority and thus constituted breach of contract.

7. Modification of rate structure of timber sale contract is in violation of 36 C.F.R. § 221.16(a) (1976), which prohibits retroactive rate modifications, because modification pertains to contract unexecuted portions as well as executed portions. However, contractor, who signed modification agreement and performed contract in accordance therewith, cannot now assert violation to excuse himself from agreement.

Mr. Gene Peters claims $133,432.07 for an alleged breach of a logging sale contract by the Forest Service, United States Department of Agriculture. The contract, Skyo Line Timber Sale Contract No. 02425-4, was awarded after competition to the claimant on February 20, 1975, as part of a salvage program to control a bark beetle epidemic in the Randle and Packwood District of the Gifford Pinchot National Forest in Washington State. The contract provided for termination on or before June 30, 1975. To ensure timely performance, the Forest Service required the claimant to post a $250,000 performance bond.

The Skyo Line Timber Sale consisted of 10 separate cutting units. The contract awarded under the sale provided for helicopter logging in units 4 through 10 of the sale area. Helicopter logging was specified to protect against environmental damage, i.e., "to protect soil

[and] watershed * * *." The Forest Service chose not to seek to negotiate road easements over private land that would have allowed the use of an existing road system which provided access to portions of units 5, 6, and 10 because of time and possible cost constraints; rather, to expedite matters, helicopter logging was specified for those sale units which otherwise were inaccessible.

On March 31, 1975, the claimant obtained, at his expense, an easement over the private land enabling him to use the road system for access to portions of units 5, 6, and 10. As a result, Mr. Peters could use a "high lead slack line" system of logging on portions of units 5 and 6 and tractor logging on unit 10. These logging methods would accomplish essentially the same environmental protection purposes as helicopter logging.

In early March 1975, the claimant advised the Forest Service of his impending successful acquisition of the easement. On March 11, 1975, he asked for permission to use the above-specified alternative methods of logging in units 5, 6 and 10. At that time, the Forest Service advised Mr. Peters that the change in logging methods was permissible, but it would only be authorized if the claimant agreed to execute a formal contract modification with increased stumpage and per acre rates to offset the substantial cost savings resulting from the change. The Forest Service states that it also required the price adjustment to protect the interests of the other bidders and to preserve the integrity of the competitive bid process. Discussions between the claimant and the Forest Service stretched into April as Mr. Peters continued work on other units.

On April 24, 1975, the claimant and the Forest Service executed an Agreement to Modify the Contract, Form 2400-9, effective February 20, 1975, under which the Forest Service agreed to allow the use of the alternate logging methods in units 5, 6 and 10, and the claimant agreed to a stumpage rate increase from $38 per MBF (1000 board feet)--his bid price--to the redetermined rate of $49.18 per MBF and a per acre rate increase from $0.57 per acre to $11.62 per acre. Thereafter, the claimant completed all obligations of performance under the contract.

The claim in question here is based upon Mr. Peter's assertion that the modification was unauthorized, improper and constituted a breach of contract, and that, consequently, any increased price paid by him under the modification should be refunded.

Mr. Peters asserts that the change in logging method could have been accomplished by interpreting and applying the original contract provisions. In this regard, Mr. Peters' counsel states:

> "The Forest Service also contends that the contract modification is one both authorized and contemplated by B8.32 of the contract * * *. There has been no change in physical conditions in the sale area or included timber. The only change that occurred was Mr. Peters' obtaining legal permission from private parties to use portions of an existing road system.
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> "B8.32 is not applicable since no changes occurred * * *."

Mr. Peters' counsel also states:

> "What the Forest Service did was change the rate provisions of * * * the contract * * * directly contrary to law, regulation and policy."

The pertinent provisions of the contract regarding contract modification include the following:

> "B8.3 Contract Modification. The conditions of this sale are completely set forth in this contract. This contract can be modified only by written agreement of the parties, except as provided under B8.31.
>
> "By agreement and with compensating adjustments where appropriate, this contract shall be modified to provide for (a) the exercise of any authority hereafter granted by law or Regulation of the Secretary of Agriculture if such authority is then generally being applied to Forest Service timber sale contracts and (b) any other contractual provision then in general use by Forest Service.
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> "Contract modifications, redetermination of rates, and termination shall be in writing and may be made on behalf of Forest Service only by the Forest Service officer signing this contract, his successor or superior officer.
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> * * * * *
>
> "B8.32 Changed Conditions. When it is agreed that the completion of certain work or other requirements

> hereunder would no longer serve the purpose intended because of substantial change in the physical conditions of Sale Area or Included Timber since the date of the contract, said requirements shall be waived in writing. * * *"

While Mr. Peters argues that clause B8.32 of the contract is inapposite to the facts present in this case, we need not address the question of its applicability here, notwithstanding its citation by the Forest Service, because the Forest Service acted properly within the scope of clause B8.3 and applicable provisions of 36 C.F.R. Part 221, et seq. (1976).

There are only four circumstances, outlined in 36 C.F.R. § 221.7(e) (1976), where the rates of a timber contract may be adjusted without modification of the contract. Both the Forest Service and Mr. Peters agree that none of these four circumstances are present here. Accordingly, the rates under the original contract could not have been properly adjusted (upwards or downwards) without a formal modification of the original contract.

Clause B8.3 provides that modification of the contract is permitted only if both parties agree to the written modification. (The question as to whether Mr. Peters actually agreed to the modification is discussed below.) Further, clause B8.3 allows the contract to be modified, with compensating adjustments where appropriate, to provide for contractual provisions then in general use by the Forest Service. See Star Valley Lumber Company, B-168544, March 22, 1974, 74-1 CPD 140; Arden Tree Farms, B-184647, September 24, 1975, 75-2 CPD 182. The Forest Service states:

> "Provisions for slack line or other cable type yarding are in general use by the Forest Service in western Washington. Therefore, a change from helicopter to slack line yarding could be made under B8.3 * * *"

We agree with this Forest Service interpretation of clause B8.3.

Mr. Peters' counsel has asserted that this interpretation of clause B8.3 is not valid because of Forest Service Manual § 2451.83 (Amend 93, Dec. 1975), which states in pertinent part:

> "This section give[s] authority for contract modification upon rate redetermination, because of changed condition, to recognize applicable new laws and regulations and for catastrophe. * * *"

It is contended that this FSM provision shows that a modification can only be required under clause B8.3 where there is a scheduled or required rate redetermination. However, we believe the referenced FSM interpretation of clause B8.3--an interpretation which we do not believe was intended to be exclusive--still recognizes the propriety of the interpretation given clause B8.3 here. The Forest Service found the rates had to be redetermined because of a "changed condition" regarding access to an otherwise inaccessible portion of the sale area. This "changed condition" could allow for logging methods other than the helicopter logging provided for in the contract, which would be in accordance with contractual provisions then in general use by the Forest Service.

16 U.S.C.§476 (1970) requires that timber be offered for sale at not less than the "appraised" value--which includes consideration of estimated operating costs of the purchaser. See 36 C.F.R. § 221.7 (1976). The record indicates that the "appraised" value reflected that the more expensive helicopter logging method was contemplated, and the sale was advertised on this basis. In this connection, the Forest Service states in an August 11, 1976, letter:

> "* * * Whether a compensating adjustment in price is justified or appropriate depends upon the specific conditions and terms of the contract. If the contract states a restriction of some kind, an equivalent action in compliance may be acceptable, if it is clearly not disadvantageous, although compensating price adjustment may be appropriate. On the Packwood District of the Gifford Pinchot National Forest, requirements to log with helicopters strongly

> tend to reduce the prices advertised and the prices bid for timber. This can easily be seen by comparing prices of Packwood District sales made during 1975, the year in which the Skyo Sale was made. Douglas-fir is the major species on the Skyo Sale. For all sales with more than 1 million board feet of that species made on the District in 1975, the average bid for helicopter sales, including the Skyo Line Sale, was $21.28 per M board feet. The average bid for the same species for non-helicopter sales was $178.90 per M, or 741 percent more! The amount bid above the advertised was $66.16 per M, or more than four times the $15.17 average for helicopter sales.
>
> "A Forest Service official would be considered derelict in his duties if he ignored this relationship, and the need for compensating adjustments, as specified in B8.3 of the contract."

In addition, the Forest Service has asserted:

> "Other bidders who were outbid by the purchaser could argue with justification that had they known we would permit such a modification, they would have been able to bid higher, too. Perhaps they could have bid even higher than the modified rates, since the risks of helicopter logging can be considered to be a deterrent by some potential bidders."

Although other bidders may also have known of the possible easement to portions of units 5, 6 and 10, the sale specifically provided for helicopter logging in these units, unless otherwise agreed to by the Forest Service.

Moreover, although paragraph C.42f of the contract indicates that changes in logging methods may be authorized without modifying the contract, it is clearly discretionary with the Forest Service whether to grant a contractor's request regarding an alternate logging method. That is, under appropriate circumstances, as here, we believe the Forest Service could decline to allow the use of an alternate logging method unless additional consideration is paid to the Government.

Mr. Peters also asserts that the Forest Service acted contrary to various provisions of the FSM by requiring the modification, in that the logging method change should have been allowed without raising the stumpage and acreage rates. However, we believe the Forest Service actions in requiring a modification in this case were not inconsistent with any of the FSM provisions cited by Mr. Peters or his counsel. In any case, the Forest Service Manual is merely an expression of Forest Service policy, "which does not rise to the status of a regulation." Hi-Ridge Lumber Company v. United States, 443 F.2d 452, 455 (9th Cir. 1971). The failure of an agency to adhere to a departmental policy does not render an action by that agency invalid. 43 Comp. Gen. 217, 221 (1963); PRC Computer Center, Inc., 55 id. 60, 68 (1975), 75-2 CPD 35.

In the circumstances, the Forest Service contracting officer did, in our view, act lawfully, as discussed above, and within the scope of his authority in requiring a modification of the contract rates commensurate with the changed method of operation.

Mr. Peters' counsel also alleges that the Forest Service extracted the increased stumpage rates through coercion and duress. In this regard, in his letter dated May 21, 1975, to the District Ranger, Packwood Ranger District, the claimant stated:

> "* * *I advised your Timber Staff that I would sign the modification, however, only due to the fact that I was advised if I did not sign the contract, the Forest Service would suspend my logging operations. As I said, I would sign, but only under protest. Furthermore, that I would pursue the matter to determine if proper procedures had been followed. * * *"

In a letter dated October 18, 1976, Mr. Peters' counsel further stated:

> "The coercion arose out of the Forest Service refusing to let Peters continue to operate until he signed the formal modification agreement. * * *"

In summary, as stated in counsel's letter of June 3, 1976, it is claimed that Mr. Peters "did not consent to the modification, since it was extracted as a result of coercion by the Forest Service * * *."

The Forest Service vigorously denies that Mr. Peters was coerced into signing the modification. By letter dated June 20, 1975, the Forest Supervisor at Gifford Pinchot National Forest stated:

> "The District kept the purchaser informed verbally all the way through the process of redetermining rates for the modification. * * * In fact, the Purchaser was personally handed by District personnel a penciled rough-draft copy of the re-appraisal in early March, well enough in advance to ascertain the costs and requirements involved, and on which to base his decision.
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> * * * * *
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> "The contacts with Forest Service employees and the ensuing discussions were sufficiently timely to provide the Purchaser with full opportunity to digress and prepare his decisions."

By letter dated December 11, 1975, the Director of Timber Management stated:

> "* * * Mr. Peters requested the yarding system changed. The Agreement to Modify the Contract, Form 2400-9, was prepared and sent to Mr. Peters on April 22, 1975. He signed it and returned it to the Forest Service. * * * The first evidence of Mr. Peters' protest to the increased stumpage rate in the modification is in his letter of May 21, 1975.
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> * * * * *
>
> "Since modification of the contract has been signed and the stumpage rates increased without evidence of protest, we do not believe Mr. Peters was coerced into signing the modification."

Again by letter dated August 11, 1976, Chief of the Forest Service commented:

"There is no evidence of 'coercion' whatever, to support allegations introduced by the claimant. There was no action by the Forest Service to prevent the purchaser from logging Units 5, 6, and 10 by helicopter, as called for by the Sale Area Map and by clauses B6.42 and C6.42# of the contract. The only factor here might have been Forest Service concern to log the timber the way the contract specified; * * *. Local forest officials have denied that there was coercion.

"In a series of discussions on March 8-11, 1975, Mr. Peters was given estimates of the amount of compensatory adjustment in stumpage rates which would be involved if he were to request and be given the modification. On March 11, 1975, he requested the modification.

* * * * *

"Purchaser was not compelled to change the contract; he could have carried it out without changes.

* * * * *

"Forest Service personnel report that Mr. Peters did not protest, either in writing or verbally, at the time he signed the contract modification. * * * Nothing prevented him from carrying out the contract without the modificatic[illegible] * * *."

The claimant has referenced an alleged contrary statement by the Region 6 Director of Timber Management in a letter dated June 26, 1975, wherein an opinion that the contract did not have to be formally modified to allow for Mr. Peters' suggested alternative logging methods is expressed. The letter goes on to say:

"It is evident that Mr. Peters was under much pressure to expedite removal of beetle-infested timber from his sale, and felt compelled to sign the modification to help meet that objective."

However, as discussed above, the contracting officer acted lawfully in requiring the contract modification. The "pressure" to expedite removal of the timber appears to be "lawful pressure" of the required contract June 30, 1975, termination date. Urging the meeting of contractual obligations does not amount to unlawful "coercion." Furthermore, this same Forest Service official, in a letter dated December 11, 1975, after the matter was more thoroughly reviewed, expressly stated his belief that Mr. Peters was not coerced into signing the modification.

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The record before us presents no further evidence concerning whether Mr. Peters stated, at the time of executing the modification, that he was signing under protest or that he was threatened with suspension unless he signed. The modification agreement itself certainly indicates no evidence of protest by Mr. Peters. The first indication in the record that Mr. Peters did not like the modification agreement he executed was in his letter dated May 21, 1975--almost a month after the modification's execution. Moreover, we note that Mr. Peters certainly could have elected to perform the work in units 5, 6 and 10 by helicopter logging rather than sign the modification agreement allowing him to use his requested alternate logging methods.

The rule, with respect to claims against the United States, is that the claimant bears the burden of proof to establish his claim. See 31 Comp. Gen. 340 (1952). Accordingly, based on the record before us, where conflicting statements of the claimant and the contracting agency constitute the only evidence, we do not find sufficiently clear evidence to support Mr. Peters' contention that he did not willingly agree to the modification, such that payment of the claim could be supported. See Afghan Carpet Cleaners, B-175895, April 30, 1974, 74-1 CPD 220; Kemcor, Inc., B-179243, July 22, 1975, 75-2 CPD 57.

Nor can we find that the Government employed improper economic duress to compel the execution of the modification. The elements of economic duress have been found to be as follows: (1) a party compels another to assent to a transaction against his will; (2) such assent is induced by wrongfully threatening action the party has no legal right to take; and (3) the threatened action, if taken, will cause irreparable damage to the other party. Restatement, Contracts, § 493; 13 Williston, Contracts, §§ 1617-1618 (3rd ed. 1970); Hartsville Oil Mill v. United States, 271 U.S. 43 (1926); Paccon, Inc., ASBCA No. 7890, 1963 BCA 3659 (1963); Corbetta Construction Co., Inc., ASBCA No. 6290, 1964 BCA 4386 (1964). As indicated above, we do not find in the record evidence that Mr. Peters acted against his will or that the Forest Service obtained Mr. Peters' assent by wrongfully threatening action it had no legal right to take. See Beatty v. United States, 144 Ct. Cl. 203, 206 (1958). Contrast Camp Sales Corporation v. United States, 77 Ct. Cl. 659 (1933), where the Government had no legal right to require additional compensation for extending the period of performance caused by Government delays and it was clear that the contractor concurrently protested the modification.

Mr. Peters' counsel also contends that the modification is of no effect because there is no consideration to support it. Counsel also states:

> "* * * the switch was advantageous to the Forest Service in that completion of logging within the contract term, while the beetles remained dormant was assured. The risk of lost time due to bad winter weather not permitting helicopter flying was thereby eliminated."

In this connection, it is further stated in counsel's letter dated October 18, 1976:

> "It is important to recognize that the performance of the Skyo Line Contract took place between February and June of 1975. A period of time for notoriously bad weather in the Cascade Mountain Range of Western Washington, where the sale was situated. * * * Many days were lost due to bad weather and Mr. Peters was permitted additional time for performance of the Skyo Line Sale whenever helicopters could not fly due to weather or mechanical breakdowns. Revising the Skyo Line logging plan to permit the removal of 50 acres of timber by cable system guaranteed that that timber would be removed within the term of the contract, notwithstanding weather and other problems, since cable yarding systems are not affected by fog or overcast."

While timely performance was certainly in the Government's interest, we observe that Mr. Peters bore the risk of meeting the contract termination date. No extensions of the contract were contemplated and a $250,000 performance bond was required to ensure timely performance. It is therefore clear that Mr. Peters received consideration in that he was relieved of a more risky and costly method of logging on three cutting units. Also, he was allowed to use equipment he apparently was more familiar with and had more control over.

Mr. Peters' counsel argues that the modification agreement is unconscionable and unenforceable as a matter of law under the Uniform Commercial Code (UCC). (In R. H. Pines Corporation, 54 Comp. Gen. 527, 528 (1974), 74-2 CPD 385, we indicated that our Office will look to UCC principles as a source of Federal common law. Also see Everett Plywood and Door Corporation v. United States, 419 F.2d 425 (Ct. Cl. 1969)). He argues:

> "UCC 1-203 imposes on parties to contracts the obligation of good faith in the performance and enforcement of the contract. Further, where an agreement is found to be unconscionable, it is unenforceable. UCC 2-302.
>
> "The circumstances extant at the time of the execution of the modification agreement were such that the Forest Service had the power of economic life or death over Peters. Consent to a change in logging systems would insure timely performance of the contract by Peters. Denial of the requested change would hinder or preclude timely performance and would jeopardize Mr. Peters' performance bond. The Forest Service as a matter of good faith was obliged to cooperate with Mr. Peters. The requested change satisfied the Forest Service needs, and was contemplated by the original contract. The Forest Service demand that Peters agree to an increase in the purchase price of timber as a condition for consenting to the change of logging system was unconscionable when done contrary to existing Forest Service policy and when exacted by duress. This conduct renders the modification agreement unenforceable as a matter of law."

UCC § 2-302 provides in pertinent part:

> "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

The basic principle underlying UCC § 2-302 is "the prevention of oppression and unfair surprise and not of disturbance of allocation of risk * * *." See Official Comment to UCC § 2-302.

In determining whether a provision or modification of a contract is unconscionable under UCC § 2-302, the factors the courts have generally examined are the relative equality of bargaining power, the one-sidedness of the "bargain," and whether the "inferior" party was unfairly surprised by the terms of the agreement. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (C.A.D.C. 1965); Jones v. Star Credit Corp., 298 NYS 2d 264 (Sup. Ct. 1969); Equitable Lumber Corp. v. I.P.A. Land Development Corp., 381 NYS 2d 459 (C.A. 1976).

Mr. Peters characterizes himself as a "small independent contract logger, and I have not purchased any Government Timber Sales." However, Mr. Peters is portrayed in a June 20, 1975, letter of the Forest Supervisor as follows:

> "It is true that the Purchaser had not previously purchased any National Forest timber; at least none that is on the records of the Forest. However, the Purchaser does have a considerable history of logging different types of timber sales on the Forest. The Purchaser's experience in logging National Forest timber implies that he has first-hand experience and knowledge of the variety of requirements that were incorporated into the sale areas he has operated on."

This characterization has not been questioned or refuted by Mr. Peters. Further, the record clearly indicates that Mr. Peters used his ingenuity to obtain easements so alternate logging systems could be utilized.

Also, in the June 20, 1975, letter of the Forest Supervisor, it is stated:

> "The District kept the purchaser informed verbally all the way through the process of redetermining rates for the modification. * * * In fact, the Purchaser was personally handed by District personnel a penciled rough-draft copy of the re-appraisal in early March, well enough in advance to ascertain the costs and requirements involved, and on which to base his decision. His decision to request the change was promptly forthcoming." (Emphasis supplied.)

Mr. Peters also does not refute or contradict these comments.

While Mr. Peters contends that the Forest Service had no right to demand a contract modification to increase the purchase price of the timber, we are satisfied that the Forest Service acted within the bounds of its lawful authority and did not impose a "one-sided" bargain, and that Mr. Peters was kept sufficiently apprised of the actions and intentions of the Forest Service to conclude that there was no unfair surprise. Consequently, we do not believe Mr. Peters has made his case for unconscionability.

In any case, in the absence of coercion, duress or unconscionability, even assuming that this modification was not permitted under the terms of the contract (which we found above was not the case), we believe Mr. Peters' signing of the modification agreement and continuing performance of the contract in accordance with the agreement, without indication of protest and with apparent knowledge of the modification's scope, constituted an "election" or waiver of his "right" to now assert that the modification was beyond the scope of the contracting officer's authority, and thus constituted a breach of contract. See Merrill-Stevens Dry Dock & Repair Company v. United States, 119 Ct. Cl. 310, 323 (1951); Ling-Temco-Vought, Inc. v. United States, 475 F.2d 630 (Ct. Cl. 1973); Airco Inc. v. United States, 504 F.2d 1133 (Ct. Cl. 1974); Cities Service Helex, Inc. v. United States, 543 F.2d 1306 (Ct. Cl. 1976). Contrast Peter Kiewit Sons' Company v. Summit Construction Company, 422 F.2d 242, 258-259 (8th Cir. 1969).

Mr. Peters has also raised certain questions regarding the amount of additional consideration he was obligated to pay under the modification. Although no direct questions regarding the additional acreage rate have been raised, Mr. Peters has made considerable objection to the increased stumpage rate. Mr. Peters' basic contention is that no additional stumpage rate should have been charged because this was a "deficit" sale. That is, the sale was appraised by the Forest Service, prior to advertising for bids, at minus $6.40 per MBF as follows:

Selling value of timber	$245.39	per MBF
Logging and manufacturing cost	210.81	
Conversion return	$ 34.58	
"Normal" profit and risk	40.98	
Appraised value	- $ 6.40	per MBF

However, Forest Service regulations required that this particular timber could not be sold for less than $5.39 per MBF. The sale was advertised on this basis. Consequently, Mr. Peters characterizes the sale as a "deficit" sale of minus $11.79 per MBF--the amount the minimum sale rate exceeded the appraised value of the timber.

Taking into account the increased and saved logging costs over the entire sale area as a result of the changed logging methods, a net figure of $11.18 per MBF stumpage rate representing saved logging costs to Mr. Peters was computed by the Forest Service. This was the figure by which the stumpage rate under the contract was increased, i.e., from Mr. Peters' bid price of $38.00 to $49.18 per MBF.

Mr. Peters essentially contends that since the "appraised" value of the sale was $11.79 below the advertised base rate and the alleged savings from the modification were $11.18, no additional stumpage rate should have been required, inasmuch as Mr. Peters was essentially being charged the $11.18 twice under the Forest Service's calculations. That is, the reappraised value of the timber should have been calculated as $4.78 per MBF by adding the $11.18 per MBF to the minus $6.40 per MBF appraised value--which is below the $5.39 per MBF minimum sale rate.

From our review, we disagree with Mr. Peters' calculations. He was not charged $11.18 twice; rather, an adjustment to the price he bid under competition was made to reflect the net savings he achieved by virtue of his requested alternate logging methods. Mr. Peters contracted to pay a $38.00 stumpage rate--not the timber's "appraised"

value. Consequently, the contract price--not the appraised value--is the critical figure to be recalculated in making an equitable adjustment because of a contract modification. In any case, Mr. Peters agreed to the higher stumpage rate in signing the modification agreement.

The modification was made retroactive effective to the beginning of the contract period. The record indicates that considerable logging on the other units had been done by April 24, 1975--the date the modification became effective. The modification of the rate structure is in violation of 36 C.F.R. § 221.16(a) (1976), because it pertains to the contract's executed portions as well as the unexecuted portions. This regulation provides in pertinent part:

> "Timber sale contracts may be modified only when the modification will apply to unexecuted portions of the contract and will not be injurious to the United States. * * * "

Under this regulation, such retroactive modifications to the rates for the already completed portions of the timber sale contract are improper. See 49 Comp. Gen. 530, 531 (1970).

36 C.F.R. § 221.16(a) (1976) was promulgated by the Secretary of Agriculture pursuant to 16 U.S.C. § 476 (1976), and has the force and effect of law. See Paul v. United States, 371 U.S. 245 (1963); Hi-Ridge Lumber Company v. United States, supra. However, notwithstanding the violation of this regulation, we do not believe Mr. Peters can assert it to excuse himself from the contract modification he agreed to, since, by signing the modification, which was not injurious to the Federal Government, with no coercion, duress or unconscionability shown, and by continuing contract performance in accordance with the modification, this regulation became effectively inoperative insofar as Mr. Peters was concerned. See United States v. New York and Porto Rico Steamship Company, 239 U.S. 88, 92 (1915); Adelhardt Construction Company v. United States, 123 Ct. Cl. 456 (1952); Hartford Accident & Indemnity Company v. United States, 130 Ct. Cl. 490 (1955); United States v. Russell Electric Company, 250 F. Supp. 2, 22 (S.D.N.Y. 1965); B-156271, April 20, 1965; 49 Comp. Gen. 761 (1970); B-162922, October 30, 1972.

In view of the foregoing, Mr. Peters' claim is denied.

R.F. Keller

Deputy Comptroller General
of the United States